Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

v

MARTIN DeWALT MAZURIE, Et Al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO FILE FOR A WRIT OF CERTIORARI OUT OF TIME

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STATEMENT

1. In 1869, Congress ratified a treaty whereby the Wind River Indian Reservation was established in West Central Wyoming containing an area of approximately three million acres. (15 Stat. 673) This Reservation to be occupied jointly by the Arapahoe and Shoshone Indian Tribes. In 1887, Congress passed legislation setting up trust

lands and providing for the issuance of patents and the subjection of the lands to the civil and criminal process and laws of the state or territory in which they are located. (24 Stat. 390, Revised May 8, 1906, 34 Stat. 182)

By various agreements, the land area of the Wind River Indian Reservation was diminished and the United States purchased several sizable acreages of the Reservation land wherein the towns of Thermopolis and Lander, Wyoming, are located. The land on which the Blue Bull, Inc., is located did not fall within any of the purchases or land exchanges between the Tribes and the United States Government.

2. Under rights granted by Congress in the Act of 1887, an original patent was issued in 1954 to the respondents' predecessor in title. (Respondents' Trial Exhibit "A") This patent contained no restriction as to the use of the land, with the exception of an irrigation system lien. The patent was fee simple and it contained the following language: "to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of said claimant forever". (emphasis supplied)

In 1954, the respondents' predecessor in title under this patent acquired from the State of Wyoming a valid Wyoming liquor license and founded and operated a liquor establishment on the premises which has been in continuous operation

from the years 1954 to 1972. Throughout this litigation, this State of Wyoming license was still current and valid. (R-125)

3. In February of 1972, the Wind River Tribes passed an ordinance prohibiting the sale of liquor within the Indian Country under their jurisdiction unless the seller obtained a Tribal license as well as a State license. (R-74) The respondents had operated the Blue Bull Bar prior to the enactment of the 1971 Tribal ordinance under their State license. On April 3, 1972, the respondents were given the choice of obtaining a Tribal license or facing criminal prosecution. Accordingly, on April 12, 1972, a Tribal license was requested; a public hearing held on April 17, 1972, at the conclusion of which the respondents' application was denied. The record of the Tribal public hearing is such that it is totally unintelligible and can hardly be called verbatim, inasmuch as even learned counsel's argument cannot be gleaned from the transcript. In any event, the Tribal license was denied the respondents and after a short period of inactivity the bar was opened to operate under the provisions and regulations of the State of Wyoming; the valid and existing liquor license then in effect. On June 13, 1972, federal officers seized the alcoholic beverages. Criminal prosecution was initiated on June 29, 1972, with the filing of criminal informations in the United States District Court for the District of Wyoming.

4. In the case tried before the District Judge, the Government had to carry the burden of proof

and establish that The Blue Bull Bar was located in an 'Indian community'. This requirement of proof, of the location of the land being within an Indian community, was an affirmative element of the crime as set forth in the statute, 18 U.S.C. 1154 (c). The land in question was located upon a county road and right-of-way and was fully taxed and regulated by the State of Wyoming as fee patent land, said jurisdiction having been assumed by the State of Wyoming upon the issuance of the patent in 1954.

The District Judge made his finding that The Blue Bull Bar was located in "Indian Country" and as such in violation of 18 U.S.C. 1154 (R 29-32).

5. The Court of Appeals reversed and held that the Government did not meet its burden of proof in establishing that the respondents were located within an Indian community under the provisions of 18 U.S.C. 1154 (c). (emphasis supplied)

The Court of Appeals narrowed the issue as follows:

> "Thus if it is assumed for the moment that the fee land in question is in 'Indian Country' generally, the question whether the particular place was also in a 'non-Indian community' must be resolved if it can be. If the tavern was in a 'non-Indian community' in 'Indian Country', no crime was committed . . ."

The Court of Appeals held that the Government had failed to prove the fact that the tavern was located in an Indian community and went further to indicate that the statute itself was vague and ambiguous in not providing for any standards or definitions of the term "Indian community". Thereafter, the Court of Appeals further questioned the power of the Government to regulate the respondents or to delegate that power to the Indian tribes over non-Indians living on fee patent lands within Indian Country, which was an improper delegation of governmental authority and jurisdiction to the Indian tribes. (emphasis supplied)

ARGUMENT FOR NOT GRANTING THE PETITION

1. By the provisions of Rule 22 (c) of the Supreme Court Rules, petitions for review on certiorari filed out of time are not favored. The respondents respectfully submit that this is not a case of any such crucial importance so as to require the extraordinary relief of the filing of this case on certiorari now out of time. It is noted that Marvin J. Sonosky, Esq. and Glen A. Wilkinson, Esq., counsel for both of the Indian tribes involved, were sent copies of the Court of Appeals' Opinion and Judgment Mandate dated November 8, 1973, as well as Lawrence E. Shearer, Esq. and Wallace H. Johnson, Esq., Assistant Attorney General, Department of Justice, Washington, D.C., both of whom appear on the motion for petition here. It is submitted that if this case were of such importance as now implied in the petition, that the counsel for the Indian tribes would have been in close liaison

with the proper Justice Department Division to perfect their appeal according to the rules. (App.A attached hereto)

Other than the inadvertence of the Government, there is no compelling reason why extraordinary relief should be granted the petitioners in this case who are now out of time.

2. The respondents contend that the Court of Appeals' decision does not effectively abolish control of alcoholic beverages on Indian Reservations. The respondents respectfully submit that, as pertains to non-Indian fee lands created by patent, Government control and jurisdiction has passed to and is complete in the State. The State of Wyoming has all necessary statutory regulations to adequately control licensing and sale of alcoholic beverages within these deeded portions of the Reservation owned by non-Indians. (emphasis added) Likewise, any protests that may be made about the operation of any liquor establishment so situated are properly directed to, and by law controlled by the County Commissioners and the State of Wyoming. With adequate appeal provisions to the courts, liquor operations in the State of Wyoming are quite likely among the most tightly controlled and supervised of functions within the business community and it is submitted that the state jurisdiction is complete and effective for all necessary regulatory purposes. As pertains to Indians, the Tribe has every authority under the decision of the Court of Appeals to continue to regulate their own affairs.

3. As required by Rule 19 (1) (b), the Court of Appeals has not rendered any decision in this case in conflict with the decision of another Court of Appeals on the same subject matter, i.e. the interpretation and definition of the term "Indian Community" as found in 18 U.S.C. 1154 (c). The Court of Appeals has, by their decision in this case, decided no state or territorial question in a way conflicting with applicable state or territorial law, nor has the Court's decision decided an important question of federal law that needs the intervention and supervision of the Supreme Court of the United States. The decision of the Court of Appeals is not in any way in conflict with applicable decisions of this Court and does not depart from the accepted and usual course of judicial proceedings such as to call for an exercise of this Court's power of supervision.

The petition does not fit the categorical requirements of Rule 19 of the Supreme Court Rules so as to demand exercise of the Supreme Court's power of supervision of the Court of Appeals for the Tenth Circuit.

4. The respondents further argue that the Government's contention, that the case really concerns the question of regulation and the general regulatory scheme of Congress as pertains to alcoholic beverages in Indian reservations, cannot control the issue inasmuch as this was a criminal prosecution. The Court of Appeals has simply stated that under the particular facts and circumstances of this specific criminal prosecution,

the Government could not carry its burden of proof and place these respondents as non-Indians living on fee patented lands within an 'Indian community'. As such a factual matter, this case does not fit the criteria of Rule 19 (1) (b) which concerns itself with questions of law and the procedural relief of certiorari.

5. The Indian Tribes' contention, that the State of Wyoming will allow every deeded portion within the reservation to become a bar, is totally unfounded in fact and in law. The State of Wyoming statutes are such that liquor licenses are issued on the basis of population ratios within county areas and the fear and contention of the Government and the Indian tribes to this issue is without any basis in fact so as to require the supervision of the Supreme Court of the United States over a state regulatory function.

CONCLUSION

For the foregoing reasons, a petition for a writ of certiorari filed out of time should not be granted.

Respectfully submitted.

CHARLES E. HAMILTON
Attorney for Respondents

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(On the Brief for Respondents)

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HOWARD K. PHILLIPS
CLERK

OFFICE OF THE CLERK
DENVER, COLORADO 80202

TELEPHONE
303-837-3157

November 8, 1973

Charles E. Hamilton, Esquire
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Re: No. 73-1077, U. S. A. v. Martin Dewalt Mazurie
No. 73-1078, U. S. A. v. Margaret J. Mazurie
No. 73-1079, U. S. A. v. The Blue Bull, Inc.

Dear Mr. Hamilton:

Enclosed is a copy of the opinion of the Court in the above cases. Judgments in accordance with that opinion have been entered today.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk

By:

Lavon M. Irlbeck,
Deputy Clerk

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Enclosure

cc: Marvin J. Sonosky, Esquire, Attorney at Law, 1225 - 19th Street, N. W., Washington, D. C. 20036
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Honorable Richard V. Thomas, United States Attorney, P. O. Box 668, Cheyenne, Wyoming 82001